

REMARKS

By this Amendment, claims 1 and 5 are amended merely to clarify the recited subject matter. Claims 1-14 are pending.

Claims 1, 3, 5-8, 10 and 13 were rejected under 35 U.S.C. 102(e) as being anticipated by Swisher (US 6,385,253). Claims 1 and 2 were rejected under 35 U.S.C. 103(a) as being unpatentable over Mestdagh, et al. (EP 0 740 451 A; hereafter "Mestdagh"). Claim 4 was rejected under 35 U.S.C. 103(a) as being unpatentable over Swisher in view of Furukawa (EP 1 024 648). Claims 11 and 12 were rejected under 35 U.S.C. 103(a) as being unpatentable over Swisher. Claims 9 and 14 were rejected under 35 U.S.C. 103(a) as being unpatentable over Swisher and in view of Shenoi (US 6,829,292).

Applicants traverse all of the rejections because the cited prior art references, analyzed individually or in combination, fail to disclose, teach or suggest all the features recited in the rejected claims. For example, the cited prior art fails to teach or suggest the claimed invention wherein the at least one non-VDSL uplink frequency band is located below 138 kHz.

SWISHER IS DEFICIENT

The Office Action asserted that Swisher discloses a method of transmitting information between a network and a subscriber's transceiver unit 172 including the claimed features including using a non-VDSL uplink frequency band for conveying information from the subscriber's transceiver to the network. However, Swisher's uplink stream is in the frequency band between 317 and 965 kHz, which is conventionally understood to be VDSL. The fact that Figure 2 of Swisher also includes an illustration of where POTS and ISDN frequency bands is irrelevant because Swisher does not teach or suggest utilizing the POTS or ISDN frequency bands to convey information from the subscriber's transceiver unit 172. Therefore, Swisher fails to disclose, teach or suggest conveying information from the subscriber's transceiver unit to the data network using at least one non-VDSL uplink frequency band, wherein the at least one non-VDSL uplink frequency band is located below 138 kHz.

Accordingly, the rejection of independent claims 1 and 5 and their respective dependent claims 3, 6-8, 10-13 based on Swisher is traversed.

**SWISHER IN COMBINATION WITH FURUKAWA OR SHENOI IS DEFICIENT**

Furukawa fails to remedy the deficiencies of Swisher because Furukawa merely teaches conventional processes associated with initialization procedures for a VDSL transceiver. In Furukawa, detection of when someone is using a phone for a phone call is performed. When the phone is not off-hook, Furukawa teaches using the lower frequencies for ADSL upstream. However, Furukawa fails to teach or suggest using downlink filter means to convey information from the data network to the subscriber's transceiver unit, using at least one VDSL downlink frequency band, and using uplink filter means for conveying information from the subscriber's transceiver unit to the data network, using at least one non-VDSL uplink frequency band, wherein the at least one non-VDSL uplink frequency band is located below 138 kHz. Therefore, the combined teachings of Swisher and Furukawa fail to disclose, teach or suggest the claimed invention recited in independent claims 1 and 5 and their respective dependent claims.

Similarly, Shenoï fails to remedy the deficiencies of Swisher and Furukawa because Shenoï merely teaches the use of frequency band-specific bandpass filters to improve transmission characteristics. However, Shenoï fails to teach or suggest using at least one VDSL downlink frequency band to convey information from a data network to a subscriber's transceiver unit, and using at least one non-VDSL uplink frequency band to convey information from the subscriber's transceiver unit to the data network, wherein the at least one non-VDSL uplink frequency band is located below 138 kHz.

In both Furukawa and Shenoï, the filters referred to by the Office Action are merely used for controlling characteristics within a frequency band to compensate for line length issues. Therefore, the combined teachings of Swisher and Furukawa and/or Shenoï fail to disclose, teach or suggest the claimed method for conveying information between a data network and a subscriber's transceiver unit, as recited in independent claim 1, or the claimed transceiver unit, recited in independent claim 5, and their respective dependent claims 4, 9 and 14.

**MESTDAGH IS DEFICIENT**

Mestdagh fails to describe any method of using any alternative path. Rather, it merely describes a method of bypassing an entire DSL setup through use of a separate copper pair. That setup is fundamentally different from the present invention, not just in purpose (making phones work when DSL fails), but also in implementation (switching to different a wire by

action of a mechanical switch). In fact, Mestdagh merely digitizes voice data into a data stream (which would avoid the need for POTS splitters), and then working around the problem that creates by using mechanical relays to switch to another copper wire when DSL fails.

However, Mestdagh fails to disclose, teach or suggest the claimed invention because Mestdagh is specific to an implementation for ADSL. Although the Office Action recognized this issue, the Office Action has impermissibly asserted that “it would have been obvious to substitute VDSL as the broadband technique in the Mestdagh et al.’s system for providing a faster broadband service.” Such an assertion fails to fulfill the proper standard for determining obviousness under 35 U.S.C. 103.

Under MPEP 2143, the Office bears the initial burden of factually supporting the three basic criteria of prima facie obviousness: (1) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant’s disclosure. Applicants submit that any motivation to modify the teachings of Mestdagh could only come from Applicants’ own disclosure because Mestdagh fails to provide any motivation for utilizing its teachings for VDSL rather than ADSL.

“To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references.” *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat. App. & Inter. 1985). “In determining the propriety of the Patent Office case for obviousness in the first instance, it is necessary to ascertain whether or not the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the reference before him to make the proposed substitution, combination, or other modification.” *In re Linter*, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972).

Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or

motivation to do so found either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art.

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990) Moreover, a statement that modifications of the prior art to meet the claimed invention would have been “well within the ordinary skill of the art at the time the claimed invention was made” is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references. *Ex parte Levengood*, 28 USPQ2d 1300 (Bd. Pat. App. & Inter. 1993). See also *In re Kotzab*, 217 F.3d 1365, 1371, 55 USPQ2d 1313, 1318 (Fed. Cir. 2000)

Nothing in Mestdagh, in either the Abstract of the entirety of the disclosure, teaches or suggests the possibility of applying its teachings to VDSL. Accordingly, a *prima facie* case of obviousness has not been established and the rejection of claims 1 and 2 is traversed.

### CONCLUSION

All rejections having been addressed, Applicants request issuance of a notice of allowance indicating the allowability of all pending claims. If anything further is necessary to place the application in condition for allowance, Applicants request that the Examiner contact Applicants' undersigned representative at the telephone number listed below.

Please charge any fees associated with the submission of this paper to Deposit Account Number 033975. The Commissioner for Patents is also authorized to credit any over payments to the above-referenced Deposit Account.

Respectfully submitted,

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